

1 Traeger Machetanz, Esq.
Thomas R. Krider, Esq.
2 OLES MORRISON RINKER & BAKER, LLP
745 Fourth Avenue, Suite 502
3 Anchorage, AK 99501-2136
Telephone: (907) 258-0106
4 Telecopier: (907) 258-5519

5 Attorneys for Nugget Construction Co., Inc.,
6 and USF&G, Defendants

7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

8 UNITED STATES OF AMERICA for the)
use of NORTH STAR TERMINAL &)
9 STEVEDORE COMPANY, d/b/a NORTHERN)
STEVEDORING & HANDLING, and NORTH)
10 STAR TERMINAL & STEVEDORE COMPANY,)
d/b/a Northern Stevedoring &)
11 Handling, on its own behalf,)

No. A98-009 CIV (TMB)

12 Plaintiffs,)

13 and)

14 UNITED STATES OF AMERICA for the)
use of SHORESIDE PETROLEUM, INC.,)
d/b/a Marathon Fuel Service, and)
15 SHORESIDE PETROLEUM, INC., d/b/a)
Marathon Fuel Service, on its own)
16 behalf,)

17 Intervening Plaintiffs,)

18 and)

19 METCO, INC.,)

20 Intervening Plaintiff,)

21 vs.)

22 NUGGET CONSTRUCTION, INC.; SPENCER)
ROCK PRODUCTS, INC.; UNITED)
23 STATES FIDELITY AND GUARANTY)
COMPANY; and ROBERT A. LAPORE,)

24 Defendants.)
25

REPLY IN SUPPORT OF
NUGGET CONSTRUCTION,
INC.'S AND UNITED STATES
FIDELITY & GUARANTY
CO., INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST SHORESIDE
PETROLEUM, INC.

Introduction

In Shoreside's Opposition to Nugget's Motion Regarding Miller Act Claims ("Opposition"), Shoreside provides no factual or legal basis to justify the Court overturning its previous decision regarding the earliest date on which a federal, implied-in-fact, contractual relationship could have come into existence between Nugget and the claimants. As such, the Court should reaffirm its earlier decision and grant Nugget Construction, Inc.'s and United States Fidelity & Guaranty and Co., Inc.'s Motion For Partial Summary Judgment Against Shoreside Petroleum, Inc. ("Motion").

Argument

None of the material facts relating to the present Motion are in dispute. These facts are as follows:

- At the time it began its performance relating to the Homer Spit project, Shoreside had an express contract with Spencer Rock for the goods and services it provided. *United States of America d/b/a North Star Terminal & Stevedore Co., et al. v. Nugget Construction, Inc., et al.*, 126 Fed. Appx. 348 (9th Cir. 2005)
- The claimants never entered into express contracts with Nugget. *Id.*
- The Support Agreement upon which claimants rely for purposes of establishing an implied-in-fact contract between themselves and Nugget was not executed until April 23, 1997.

1 Motion for Summary Judgment Against Shoreside Petroleum,
2 Inc., Randolph Aff., ¶ 4, Ex. 4 (Docket No. 483).

- 3 • The only sums incurred by Spencer Rock after execution of
4 the Support Agreement involve the third shipment of fuel by
5 Shoreside to Spencer Rock on May 21, 1997 in the amount of
6 \$21,278.53. *United States ex rel. North Star Terminal &*
7 *Stevedore Co., et al. v. Nugget Construction, Inc., et al.*,
8 Slip Op. No. A98-0009-CV (filed Aug. 30, 2002), at 13, n. 32
9 (citing Shoreside's, V.P., Doug Lechner's Affidavit).

10 Although Nugget strenuously disputes the existence of any federal
11 implied-in-fact contract between it and Shoreside, for purposes of
12 this Motion even if plaintiffs are able to establish that one did
13 exist, it could not have been created, as this Court previously held,
14 prior to the execution of the Support Agreement. *Id.* at 22 ("It was
15 only through the terms of the support agreement, and Nugget's actions
16 subsequent to it, that Spencer was rendered a "straw" party in the
17 chain of parties relevant to this federal project."). Shoreside makes
18 no showing that this conclusion is in error. Shoreside provides no
19 authority for the proposition that a contract existed between Nugget
20 and Shoreside at any time absent one being created by the execution of
21 the Support Agreement. Moreover, Shoreside provides no evidence to
22 alter the Court's previous factual or legal conclusions.¹

23 ¹ Here again, Shoreside fails to properly set forth any of its purported
24 "facts" in a form admissible for purposes of summary judgment. See *Orr v.*
25 *Bank of America*, 285 F.3d 764 (9th Cir. 2002). This failure provides
sufficient grounds alone to grant Nugget's Motion.

Rather than address the issues raised in Nugget's Motion, Shoreside's Opposition consists mainly of a large excerpt from its 2003 brief to the Ninth Circuit. There is nothing new in those arguments that this Court did not previously consider and reject. The Court should do so again and grant Defendants' Motion.

Because there is no basis for liability under the federal Miller Act or Alaska state law for alleged damages incurred prior to the execution of the Support Agreement on or about April 23, 1997, Nugget is entitled to partial summary judgment as a matter of law dismissing any and all of Shoreside's claims for damages incurred prior to April 23, 1997.

By: s/Thomas R. Krider

CERTIFICATE OF SERVICE

I hereby certify that on this 30th
day of May, 2006, a true and correct
copy of the foregoing was served

electronically, via ECF on:

Michael W. Sewright, Esq.
mws@bpbk.com
Burr, Pease & Kurtz
810 N Street
Anchorage, AK 99501

Steven J. Shamburek, Esq.
shamburek@gci.net
Law Office of Steven J. Shamburek
425 G Street, Suite 630
Anchorage, AK 99501-5872

Paul Stockler, Esq.
paulstockler@aol.com
1309 West 16th Avenue
Anchorage, AK 99501

Herbert A. Viergutz, Esq.
barmar@gci.net
Barokas Martin & Tomlinson
1029 West Third, Suite 280
Anchorage, AK 99501

C. Patrick Stoll, Esq.
cps@hvslaw.com
Herrig Vogt & Stoll LLP
4210 Douglas Bay Blvd., Suite 100
Granite Bay, CA 95746-5902

OLES MORRISON RINKER & BAKER LLP

By: s/Thomas R. Krider

P-TRK Reply Memo in Support of MSJ Shoreside Pre Support Agremnt 99310.0002.doc

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